

**ELIODORO LIPANA, REPRESENTED BY HER GUARDIAN AD LITEM,
ISABELO LIPANA, PETITIONER, VS. THE COURT OF FIRST INSTANCE
OF CAVITE, JOAQUIN LIPANA AND NATIVIDAD LIPANA,
RESPONDENTS.**

G.R. No. 47174. June 28, 1940

Ponente: MORAN, J.

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MORAN, J.:

A petition for certiorari.

One Eliodora Lipana filed in the respondent court an application for the probate of a will supposedly executed by the deceased, Manuela Lipana, a carbon copy of which was attached to the application. Natividad Lipana filed an opposition, and in her "oposicion supletoria" she claimed that evidence was unnecessary upon the facts alleged in the application, the copy of the will attached thereto showing, in itself, that the will had not been executed in accordance with law. The respondent court, after inspecting the copy of the will, dismissed the application on the ground that such copy could not be admitted to probate, it not having been signed by the testatrix and the attesting witnesses at the end thereof and on the left margin of each page. It is against this order of dismissal that the petition for certiorari has been filed with this court.

There can be no doubt that the respondent court acted in excess of its jurisdiction in rendering a judgment upon the merits of the case without a previous hearing. The pronouncement made by the respondent court that the will had not been executed in accordance with law, is founded undoubtedly on the erroneous assumption that the probate of the carbon copy of the will was being applied for. Such copy was attached to the application merely to corroborate the allegation as to the existence of its original and not to establish a full compliance with the requirements of the law as to the execution of the will. Such requirements are alleged in the application to have been complied with and may be proved at the hearing. It is apparent from the application that what is sought to be admitted to probate is the original of the will.

It is alleged therein that the original was in the possession of a third person or that it was either lost or destroyed by some person other than the testatrix. Under section 623 of Act No. 190, if a will is shown to have been torn by some other person without the express direction of the testator, it may be admitted to probate, if its contents, due execution and its unauthorized destruction are established by satisfactory evidence. The applicant, therefore, was entitled to hearing to prove the due execution of the original will and its loss or destruction, and the respondent court had no statutory authority to dismiss the application without such hearing.

It is alleged that, according to sections 217 and 514 of Act No. 190, a writ of certiorari may be granted only where "there is no plain, speedy and adequate remedy by bill of exceptions, or appeal, or otherwise." This rule, however, recognizes an exception. There the order or judgment is a nullity by virtue of its own recitals, as, in the instant case, wherein the order complained of recites that there had been no hearing of the facts alleged in the application, it may be attacked in any way and at any time, even when no appeal has been taken. (*Banco Espanol-Filipino vs.*

Palanca, 37 Phil., 921, 949.) This is exactly the same as a judgment in a criminal case wherein it is stated that there is no need of trial and the accused is convicted merely upon the allegations of the information. Such judgment may be "held to be 'a dead limb on the judicial tree, which should be lopped of or wholly disregarded as the circumstances require.'" (Anuran vs. Aquino, 38 Phil., 29, 36.) Indeed, we have once held that a judgment with absolutely nothing to support it, is a nullity, and may be voided at least by a proceeding in certiorari. (Yangco vs. Court of First Instance of Manila, 29 Phil., 183, 191.)

A motion for contempt is filed by the petitioner against attorney Fortunato Jose due to certain statements made by the latter in his written argument and which are derogatory to the good name of petitioner's attorney. We reiterate here what we have observed on several occasions, that attorneys should not abuse the privilege accorded them in their defense of cases in courts of justice, by indulging in offensive personalities which can in no way aid in the proper elucidation of the issues. We disapprove of the conduct of attorney Fortunato Jose and he is hereby warned that a similar misbehavior on his part in the future will be appropriately dealt with.

The order of the respondent court of November 29, 1939, issued in its civil case No. 3626, is hereby set aside, with costs against respondents.

Avanceña, Pres., Imperial, Diaz, Laurel, and Concepcion, JJ., concur.

Order set aside.

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